United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4263

BRIEF FOR RESPONDENT FEDERAL POWER COMMISSION

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Niagara Mohawk Power Corporation,
Petitioner,

v.

Federal Power Commission,
Respondent,

Town of Massena, New York,
Intervenor.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

B
P/S

DREXEL D. JOURNEY,
General Counsel,

ROBERT W. PERDUE,
Deputy General Counsel,

ALLAN ABBOT TUTTLE,
Solicitor,

ALLAN M. GARTEN,
Attorney,
For Respondent,

FEDERAL POWER COMMISSION,
WASHINGTON, D. C. 20426.

APRIL 2, 1976

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BRIEF FOR THE FEDERAL POWER COMMISSION

STATEMENT OF THE ISSUE

1. Whether the petition for review should be dismissed as a premature attack on two nonreviewable orders.

2. Whether the Commission's orders establishing an investigation are lawful and binding upon petitioner.

REFERENCE TO RULINGS

Petitioner Niagara Mohawk Power Corporation (Niagara) seeks review of two orders issued by the Federal Power Commission (FPC or Commission) in Docket No. E-9379: "Order Denying Motion To Dismiss Investigation," issued September 25, 1975 (84a) 1/ and "Order Denying Rehearing and Modifying Procedural Dates," issued November 13, 1975 (105a). 2/

STATEMENT OF THE CASE

Background

On April 14, 1975, Petitioner Niagara, pursuant to Section 205 of the Federal Power Act (Act), 16 U.S.C. §824d, submitted for filing as a rate schedule a transmission agreement, dated March 7, 1975, between Niagara and Consolidated Edison Power Company of New York, Inc. (ConEd). The service to be rendered by Niagara provides for the transmission, or wheeling, of power from Rochester Gas and Electric Corporation to ConEd.

1/ Citations followed by the suffix "a" refer to pages in the Joint Appendix herein.

2/ These two orders were published respectively in 40 Fed. Reg. 45478 (October 2, 1975) and 40 Fed. Reg. 54297 (November 21, 1975).

On May 5, 1975 the Town of Massena, New York (Massena), filed with the Commission a protest and petition to intervene and a motion to reject a rate schedule filing, or in the alternative to suspend the operation of the rate schedule for the maximum statutory period of five months and to order a hearing (5a-39a). The residents of Massena are currently sold electric power directly by Niagara. Massena contended that Niagara had refused to enter into meaningful contractual negotiations for the purchase by Massena of Niagara electric facilities in the area, thereby preventing Massena from establishing a municipal electric system, 3/ and had refused to wheel power from the Power Authority of the State of New York (PASNY) to it. As a consequence Massena alleged, inter alia, the proposal agreement between Niagara and ConEd "is an integral part of an interstate program and combination to monopolize the electric utility industry," to the detriment of existing and prospective consumer owned systems. Massena also claimed that the revenues generated from the rate filing would be unlawfully used by Niagara both "to strengthen its monopolistic position over

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3/ As a result of Niagara's alleged refusal to realistically negotiate a sale of these facilities, Massena, on March 13, 1975, filed a "Petition For Condemnation Order" in the County Court, County of St. Lawrence. That proceeding is still sub judice.

transmission in the Massena service area" and "to resist the establishment of a municipal electric systems to Massena, through advertising, legislative efforts in New York, and in its dealings with PASNY" (14a).

On May 9, 1975, both ConEd (49a-53a) and Niagara (40a-48a) filed with the Commission answers to Massena's allegations, arguing, inter alia, that Massena's anticompetitive accusations are irrelevant to the issues presented by the filing of the rate schedule.

On June 2, 1975, (54a-58a) the Commission accepted the filing of the rate schedule and permitted it to become effective as of October 27, 1974. 4/ These filed rates remained in effect for the entire schedule period, which terminated on October 31, 1975. The Commission denied Massena's motion for rejection or suspension but permitted the town to intervene in the proceedings subject to the limitation that Massena could only assert rights and interests specifically set forth in the petition to intervene.

4/ The Commission granted Niagara's request for waiver of prior notice pursuant to Section 35.11 of the Commission's Rules and Regulations, 18 C.F.R. 35.11, thereby permitting the rate schedule to become effective the previous October when the service was first instituted.

The Commission reasoned that the rate schedule was just and reasonable and free of undue preference and discrimination and that Massena had not demonstrated a sufficient nexus between both the alleged monopolistic practices and the proposed transmission agreement, and between the desire to establish a municipal electric system and the rate filing.

On June 23, 1975, Massena filed with the Commission an application for rehearing and/or clarification of decision and order of the Federal Power Commission (59a-65a), incorporating by reference all of its earlier allegations. Massena argued that Niagara did not deny Massena's allegation that Niagara refused to agree in principle to wheel PASNY power to Massena and that Niagara had admitted that it entered into wheeling arrangements with other consumer owned utilities. Finally, citing Municipal Light Boards v. F.P.C., 450 F.2d 1341 (DC Cir. 1971) and Northern California Power Agency v. F.P.C., 514 F.2d 184, (D.C. Cir. 1975), cert. denied , ___ U.S. ___ 44 U.S.L.W. 3204 (1975), Massena argued that the issues raised by its petition could not be summarily disposed of by the Commission because the petition both raised a dispute as to material facts and specifically asserted the relevance of the rate agreement to the alleged anticompetitive scheme.

On July 23, 1975, the Commission granted rehearing (66a-69a). Noting that Niagara had not denied that it had refused to wheel power to Massena and that it had admitted that it wheeled power to other consumer owned utilities, the Commission ordered an investigation and hearing to commence on December 16, 1975 to examine the merits of Massena's allegations of discriminatory treatment and anti-competitive practices.

On August 14, 1975, Niagara filed with the Commission a motion to dismiss the investigation, (73a-83a) arguing, inter alia, that Massena's anticompetitive allegations are unrelated to the reasonableness of the rate filings, and that the Commission lacks jurisdiction under Section 206 of the Act to either order an investigation or to compel Niagara to wheel PASNY power to Massena.

The Orders Under Review

On September 25, 1975, the Commission denied the motion to dismiss investigation (84a-86a) reasoning that it lacks sufficient facts with which to adequately resolve the legal issues engendered by Massena's allegations, and that an investigation, pursuant to Section 206 of the Act, would

be necessary to explore the merits of these averments.

On October 14, 1975, Niagara applied for rehearing of the September 25, 1975 order (87a-97a), arguing that the Commission lacks both the jurisdictional authority to conduct an investigation and the power to compel Niagara to wheel PASNY power to Massena.

On October 21, 1975, Massena responded to Niagara's application for rehearing (96a-103a), arguing, inter alia, that the Commission has jurisdiction to investigate by virtue of statutory authority under Section 206(a) of the Act. Massena reasoned that since Section 206(a) deals with both rates and practices that affect rates, the Commission had jurisdiction because Niagara's discriminatory refusal to wheel power is a practice that lowers revenues and results in higher rates to jurisdictional customers. Furthermore, Massena argued that Niagara's efforts to resist its attempts to establish a utility system raised rates by lessening the competition within the overall electric utility industry.

On November 13, 1975, the Commission denied rehearing of its September 25, 1975 order (105a-117a), observing that Section 206(a) of the Act provides a basis for the investigation of both electric rates and discriminatory practices that affect such rates. Since Massena alleged that Niagara was actively engaged in anticompetitive practices that affected jurisdictional rates, the Commission reasoned that it had jurisdiction under this provision to pursue its investigation. The order also modified the procedural dates of the investigation and noted that since Massena was the complainant in this proceeding, it had the burden of going forward with the evidence.

On December 3, 1975, Niagara filed its Petitioner for Review in this Court (133a). 5/

5/ On November 26, 1975, Niagara moved the Commission for a stay of the November 13, 1975 order, arguing that its attempt to seek judicial review of the September 25 and November 13 Commission orders would be prejudiced by the investigation. On December 22, 1975, the Commission denied the application for a stay because Niagara had failed to allege or establish grounds for a stay of proceedings pendante lite under the standards of Virginia Petroleum Jobbers Association v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958).

Events Subsequent To Appeal

On February 4, 1976, pursuant to Section 202(b) of the Act, 16 U.S.C. §824a(b), Massena filed with the Commission an application requesting that the Commission direct Niagara to establish physical connection of its facilities with certain facilities to be possessed and operated by Massena pursuant to its condemnation action in the New York State Courts. This application was assigned a separate docket number by the Commission, Docket No. E-9550, and is now pending before the Commission.

On February 10, 1976, the Commission moved this Court to dismiss the petition for review, arguing, inter alia, that review at this juncture was premature because the orders under review were procedural, interlocutory orders and did not aggrieve petitioner within the meaning of Section 313(b) of the Act, 16 U.S.C. §825l(b). This motion was denied by this Court on February 23, 1976, without prejudice to the Commission's right to reassert these arguments at the hearing on the merits.

On February 27, 1976, Massena filed with the Commission a request for deferral of the investigation in Docket No. E-9379 and an extension of procedural dates, noting therein that if the Commission ordered physical interconnection, pursuant to its request in Docket No. E-9550, Massena would move for dismissal of the investigation.

On March 11, 1976, Commission Staff Counsel in Docket No. E-9379, moved the Commission to dismiss proceedings in that docket without prejudice, reasoning that since Massena was requesting physicial interconnection, the pending investigation, if deferred indefinitely, "may unduly prejudice Niagara's interest in defending its 'name' in a timely fashion."

ARGUMENT

I. The Orders In Question Are Interlocutory And Are Not Sufficiently Definitive To Be Reviewable Under Section 313(b) Of The Federal Power Act.

The Commission submits that the orders under review are interlocutory in nature and, therefore, judicial review at this juncture is premature. To obtain review under Section 313(b) of the Federal Power Act, 16 U.S.C. §8251(b), an interlocutory order must be definitive in its impact and must pose a threat of irreparable injury if not challenged. Green County Planning Board v. F.P.C., 455 F.2d 412 (2nd Cir. 1972). As we shall demonstrate, the orders in the instant case are neither definitive nor do they threaten the petitioner with irreparable injury. They are merely procedural orders implementing an investigation. Orders of this type have long been held preliminary and nonreviewable. Canadian Gas Co. v. F.P.C., 110 F.2d 350 (10th Cir.), cert. denied, 311 U.S. 693 (1940); 6/ Mississippi Power & Light Co. v. F.P.C., 131 F.2d 148 (5th Cir. 1942).

The criteria for reviewability were delineated in Atlanta Gas Light Co. v. F.P.C., 476 F.2d 173 (5th Cir. 1973), wherein the Court stated that (Id. at 147):

6/ Decided under an identical provision of the Natural Gas Act, Section 19(b), 15 U.S.C. §717r(b). See e.g. State of North Carolina v. F.P.C., D.C. Cir. No. 74-1941, decided March 24, 1976 (Slip op. at 5).

> The requirement that the reviewable order be definitive in its impact upon the rights of the parties is something more than a requirement that the order be unambiguous in legal effect. It is a requirement that the order have some substantial effect on the parties which cannot be altered by subsequent administrative action [citation omitted]. The additional requirement of reviewability--the requirement that the order threaten "irreparable harm" is to the extent, redundant, since an "irreparable injury" like the effect of a "definitive" order cannot be redeemed by subsequent official action. [emphasis supplied]

The requirement that an interlocutory order must threaten irreparable injury to be reviewable is not met in the instant case. Here, the Commission has simply ordered the institution of a public hearing. Mere expense and inconvenience of a prospective administrative hearing do not constitute irreparable injury or "aggrievement" within the meaning of Section 313(b) of the Act. Elliott, et al. v. El Paso Electric Co., et al., 88 F.2d 505 (5th Cir. 1937). Cf. Younger v. Harris, 401 U.S. 37, 46 (1971); Port of Authority of State of New York v. Department of Environmental Conservation of State of New York, 379 F.Supp. 243 (N.D.N.Y. 1973).

The Supreme Court considered the reviewability of FPC procedural Commission orders in F.P.C. v. Metropolitan Edison Company, 304 U.S. 375 (1938). That case involved review of the propriety of enjoining a Commission order that established the procedural framework for an agency investi-

gation. The Court, vacating the Circuit Court's injunction, em-emphasized that preliminary or procedural orders like the ones presently under review were not reviewable (304 U.S. at 375, 384):

> The context in §313(b) indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court a transcript of the record upon which the order complained of was entered. The statute contemplates a case in which the Commission has taken evidence and made findings * * *. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

This requirement that an order be definitive to render it reviewable is grounded in fundamentally logical policy and has been reiterated many times since the Supreme Court promulgated this rule. 7/

In Metropolitan Edison, supra, the Court was concerned with the specter of "constant delays in the course of an administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions" (304 U.S. at 383-84). The Court emphasized that all administrative remedies must be exhausted before judicial review was sought.

7/ See Humble Oil and Refining Co. v. F.P.C., 236 F.2d 819, (5th Cir. 1956), cert. denied, 352 U.S. 967 (1957); Texas Eastern Transmission Corp. v. F.P.C., 357 F.2d 232 (5th Cir. 1966).

Accordingly,

> * * * attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held at war with the long settled rule of judicial administration. Id. at 385.

Consequently, while Section 313(b) does not limit review to final orders, courts are sensitive to the requirement of exhaustion of administrative remedies and have declined jurisdiction where the issues raised could be disposed of in a review of a final Commission order. Green County, supra at 425. Mid American Pipeline Co. v. F.P.C., 299 F.2d 126 (D.C. Cir. 1962); McKart v. United States, 395 U.S. 185, 194-195 (1969). Where, as here, "the order sought to be reviewed does not of itself adversely affect the petitioner but only affects his rights adversely on the contingency of future administrative action," it is manifestly an interlocutory nonreviewable order. Sunray Mid-Continent Oil Co. v. F.P.C., 270 F.2d 404, 407 (10th Cir. 1959); F.P.C. v. Hope Natural Gas Co., 320 U.S. 591, 619 (1943).

Recognition of the fundamental nonreviewability of the orders in question will not deprive petitioner of any cognizable remedy, nor will it prevent petitioner from ultimately arguing the merits of the instant orders. If petitioner is correct in any or all of its contentions relating to the validity of these interlocutory orders, then their inherent infirmities" * * * may infect with invalidity the final, definitive order of the Commission which will issue after hearing had and findings made upon the evidence. In that event, upon judicial review of the definitive order, the interlocutory order will be reviewable in so far as it may have affected the final order." Humble Oil, supra at 923; Texas Eastern, supra at 232.

In the instant case, petitioner contests both the Commission's jurisdictional authority to issue these preliminary orders establishing a hearing and the Commission's power to offer meaningful relief to Massena. 8/ Certainly both contentions can be raised if and when petitioner seeks

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8/ We note that petitioner argues that the Commission lacks the authority to order the wheeling of electricity (Pet. Br. 19-26). However, whether or not the Commission would have the authority to order wheeling under the alleged facts of this case (a question we do not now address), the investigation serves a valid purpose. As we point out in Part II, infra, there are several ways in which the Commission might fashion relief if the allegations are proven.

judicial review of a final order subsequent to the hearing. Should the Commission ultimately reject Massena's allegations of monopolistic practices, Niagara will have no cause to seek judicial review.

Finally, agency action committed by law to the discretion of the agency is not subject to judicial review unless there is a patent abuse of discretion. Municipal Light Boards of Reading and Wakefield, Mass. v. F.P.C., 450 F.2d 1341 (D.C. Cir.), cert. denied, 405 U.S. 989 (1971); Minneapolis Gas Co. v. F.P.C., 294 F.2d 212 (D.C. Cir. 1961); Section 701 of the Administrative Procedure Act, 5 U.S.C. §701(a)(2). The decision to conduct a hearing on the merits of Massena's antitrust allegations is manifestly within the ambit of the Commission's discretion, Gulf States Utilities Co. v. F.P.C., 411 U.S. 747, 762-63 (1972). Thus, for this reason alone, these Commission orders are not reviewable.

9/ The nonreviewability of these orders is underscored by staff counsel's March 11, 1976 motion to dismiss the proceeding in Docket No. E-9379. If the Commission dismisses the investigation, this proceeding will be moot and judicial review of these orders will have been a waste of this Court's time.

II. The Commission Has The Authority To Investigate The Anticompetitive Practices Of Utility Companies Where Such Practices Adversely Affect Jurisdictional Rates.

A. The Commission Has A Duty To Consider The Anticompetitive Effects Of The Regulated Aspects Of Utility Operations.

It is well settled that the Commission has the responsibility to consider matters before it in light of the fundamental national economic policy expressed in antitrust laws. Gulf States Utilities Co. v. F.P.C., 411 U.S. 747 (1973); City of Huntingburg v. F.P.C., 498 F.2d 778 (D.C. Cir. 1974): California v. F.P.C., 369 U.S. 482 (1962). Where, as here, the activities in question threaten to become the subject of an antitrust suit in district court, 10/ an FPC investigation is particularly appropriate because:

> * * * consideration of antitrust and anticompetitive issues by the Commission * * * serves the important function of establishing a first line of defense against those anticompetitive practices that might later be the subject of antitrust proceedings. Gulf States, supra at 760.

An investigation by the Commission will serve as a first line of defense against the anticompetitive activities of

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10/ On April 4, 1975, counsel for Massena informed Niagara Mohawk that it would sue Niagara in federal district court "under the antitrust laws of the United States" (36a-37a).

Niagara--if any are shown--by aborting these practices in their inception and obviating the necessity for a prolonged antitrust trial in district court.

Allegations of anticompetitive practices should be "dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique market place involved * * *". U.S. v. Western Pacific R. Co., 352 U.S. 59, 64-65 (1956). Assuming, arguendo, that the Commission cannot provide Massena with the wheeling relief it seeks, 11/ a factual determination "by the agency charged with the primary responsibility for governmental supervision or control of the particular industry or activity involved" Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 68 (1970); of the anticompetitive effects of Niagara's rate filings and of its refusal to sell its facilities to Massena and to make wheeling arrangements would be of great value to an antitrust court. Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966); Far East Conference v. U.S., 342 U.S. 570 (1952).

11/ As we have noted, the question of whether the Commission can order wheeling does not control the question whether the Commission can investigate the anticompetitive practices of a regulated utility. See n. 8, supra, and accompanying text.

B. The Commission Has The Authority To Investigate And Regulate Discriminatory Practices That Affect Jurisdictional Rates.

As both the Commission 12/ and Massena 13/ have noted, Section 206(a) of the Federal Power Act, 16 U.S.C. §824e(a), provides the Commission with the authority to investigate the scope of Niagara's alleged anticompetitive activities. This section provides in part:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, [14/] shall find * * * that any rule, regulation, practice, or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, * * * practice * * * to be thereafter observed and in force, and shall fix the same by order. [Emphasis supplied].

12/ "Order Denying Rehearing and Modifying Procedural Dates," issued November 13, 1975 (105a-113a).

13/ "Application for Rehearing and/or Clarification of Decision," filed June 23, 1975 (59a-65a).

14/ Petitioner's argument that the investigation is a sham because the Commission would not investigate "but for Massena's unsupported allegations against Niagara" (Pet. Br. 34) is clearly without merit. While Massena's petition to intervene may have brought these alleged practices to the attention of the Commission, the Commission made the decision to investigate based on the evidence available, including Niagara's failure to deny Messena's allegation that it had refused to negotiate wheeling and the undisputed fact that Niagara did wheel for other customer owned facilities (73a).

Niagara alleged refusal to either wheel PASNY power or sell its facilities in the area of Massena to Massena constitutes practices which may affect jurisdictional rates in two ways. First, Niagara's refusal to wheel PASNY power, in light of its admission that it wheels this power to other consumer owned utilities, is a discriminatory practice that may result in underutilization of Niagara's transmission facilities and in concomitant higher rates to jurisdictional customers to compensate for this obvious revenue loss. Second, Niagara's refusal to wheel and to sell Massena the electric facilities prevents the entry of Massena into the electric utility industry. To the extent that Niagara is successful in resisting competition, both wholesale and retail rates are adversely affected.

Niagara mistakenly relies on the Commission's acceptance of the subject rate filing to support its contention that the Commission's investigation is a sham (Pet. Br. 16-19, 34-35). The Commission, however, is investigating alleged anticompetitive practices that affect rates and not this particular rate. If Massena's petitions are

correct, these practices, by barring competition may render Niagara's rates unreasonably high. There is no way to evaluate the reasonableness of these filings, in light of Massena's allegations, without examining the practical context in which these rates (as well as future rate schedules) are established. While the subject transmission agreement has expired, 15/ a determination by the Commission that Niagara's rates are inordinately high, due to discriminatory practices, will have a prospective, salutary effect on Niagara's future rate filings.

In response to the mandate of Northern California Power Agency v. F.P.C., 514 F.2d 184 (D.C. Cir. 1975), 16/ Massena

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15/ The recurring nature of these short term rate agreements prevents this proceeding from becoming moot. Roe v. Wade, 410 U.S. 113 (1973).

16/ In Northern California, the Court affirmed the Commission's orders denying a request for a hearing to consider the anticompetitive consequences of a rate schedule, but noted that "while the consequences of the rate schedules could possibly further the alleged anticompetitive scheme, NCPA neither challenged the rates nor asserted their particular relevance to the alleged scheme" (514 F.2d at 189) (Emphasis supplied).

has alleged with specificity the anticompetitive consequences of the subject rate filing (13a-14a). These allegations of a direct relationship between the rate filings and Niagara's anticompetitive practices, in conjunction with the Commission's authority to investigate these practices pursuant to Section 206(a) of the Act, form the requisite basis for the Commission's orders establishing the investigation.

Niagara erroneously relies upon Northern California Power Agency and City of Lafayette v. S.E.C., 454 F.2d 941 (D.C. Cir. 1971) 17/ to support its argument that the Commission must find a positive nexus between the activities challenged and the activities furthered in order to investigate (Pet. Br. 26-32). In both cases, the Court was reviewing the Commission's denial of a request for hearing. The nexus rule is a judicially created standard of review designed to test the legality of the Commission's discretionary power to summarily dispose of anticompetitive allegations. Thus, the reviewing court will affirm the Commission's denial of a hearing where the complainant has failed to demonstrate

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17/ Aff'd. sub nom. Gulf States Utilities Co. v. F.P.C., 411 U.S. 747 (1973).

any reasonable nexus between the activities challenged and the activities furthered. This rule does not, however, come into play when the Commission grants the request for a hearing. Furthermore, the Commission, in its July 23, 1975 order, granted Massena's request for a hearing and thus reversed the finding in its June 2 order that Massena had failed to establish a reasonable nexus between the rate filing and Niagara's alleged anticompetitive practices.

Having specifically alleged a factual relationship between these rate filings and anticompetitive practices, the Commission was required to evaluate the merits of these accusations. Gulf States, supra. The Commission could not summarily dispose of these issues because there existed a clear dispute between Niagara and Massena as to material facts. 18/ Municipal Light Boards v. F.P.C., 450 F.2d 1341 (D.C. Cir.), cert. denied, 405 U.S. 989 (1971);

18/ Niagara maintains that it did not refuse to wheel power (Pet. Br. 26), and that Massena's only factual allegation is that Niagara has refused to wheel (Pet. Br. 5, 19). However, compare this contention with the list of allegations made by Massena in its petition to intervene (13a-14a).

cf. Citizens of Allegan County v. F.P.C., 414 F.2d 1125 (D.C. Cir. 1969); Bell Telephone Co. of Penn. v. F.C.C., 503 F.2d 1250 (3rd Cir. 1974). A hearing on these matters is particularly important where the Commission's final decision will be enhanced or assisted by the receipt of evidence. City of Lafayette, supra.

III. The Commission Has The Authority To Investigate To Determine The Extent Of Its Jurisdiction.

The initial determination of the extent of the Commission's jurisdiction must be left up to the agency itself. Where the Commission is in the process of establishing procedures through which it can determine the scope of its jurisdiction over a controversy, the courts should defer to the agency for this initial determination of jurisdiction. Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); F.P.C. v. Louisiana Power and Light Co., 406 U.S. 621 (1972). While the Commission's decision as to its jurisdiction "is not the last word, it must assuredly be the first." Louisiana Power, supra at 647; Marine Engineers Beneficial Assn. v. Interlake S.S. Co., 370 U.S. 173, 185 (1962).

The power to regulate carries with it, by necessary implication, the authority to investigate to determine whether there exists a jurisdictional basis for appropriate relief. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 210 (1966). As we have demonstrated, the Commission has the authority to regulate discriminatory practices that affect jurisdictional rates. Niagara's assertion that the Commission is without authority even to investigate contravenes

the principle established by this Court that:

> The Commission must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination of whether the particular activities come within the Commission's regulatory authority. S.E.C. v. Brigadoon Scotch Distributing Co., et al., 480 F.2d 1047, 1052-53 (2nd Cir. 1973), cert. denied, 415 U.S. 915 (1974).

It is clear that the Commission's regulatory responsibilities would be unduly hampered if it did not have the recognized right to conduct hearings to determine the extent of its jurisdiction. Canadian Gas Co. v. F.P.C., 110 F.2d 350 (10th Cir.), cert. denied, 311 U.S. 693 (1940); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943). Where the investigatory 19/ and accusatory 20/ duties are delegated by statute to an agency, the agency must take all appropriate steps to inform itself of possible violations of the law. United States v. Morton Salt Co., 338 U.S. 632 (1950).

The Commission may ultimately determine that Massena's allegations are without merit or that the relief requested by Massena is beyond the scope of the Commission's authority.

19/ Section 206 of the Federal Power Act, 16 U.S.C. 824e (a) and (b).

20/ Section 314(a) of the Federal Power Act, 16 U.S.C. 825m(a).

However, these are issues that can be properly resolved only after the Commission conducts a hearing and marshalls the facts into a meaningful pattern. Cf. Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481 (1958).

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed or, in the alternative, the Commission's orders should be affirmed.

Respectfully submitted,

Drexel D. Journey
General Counsel

Robert W. Perdue
Deputy General Counsel

Allan Abbot Tuttle
Solicitor

Allan M. Garten
Attorney

For Respondent
Federal Power Commission
Washington, D.C. 20426

April 2, 1976

Section 206 of the Federal Power Act, 16 U.S.C. §824e, provides as follows:

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

Commission upon own motion or complaint may determine reasonable rates, etc.

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [49 Stat. 852; 16 U.S.C. 824e(a)]

Investigation and determination of cost of production and transmission.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852; 16 U.S.C. 824e(b)]

Section 313 of the Federal Power Act, 16 U.S.C. §8251, provides as follows:

REHEARINGS; COURT REVIEW OF ORDERS

SEC. 313. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commision may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act.[19]

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28,

United States Code.[20a] Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.[19] No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).[21]

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [49 Stat. 860; 16 U.S.C. 825*l*]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Niagara Mohawk Power Corporation, Petitioner,	)	
v.	)	No. 75-4263
Federal Power Commission, Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief by mailing printed (offset) copies to counsel listed below:

Lauman Martin, Esquire
300 Erie Boulevard West
Syracuse, New York 13202

Bernard D. Fischman
Shea, Gould, Climenko, Kramer & Casey
330 Madison Avenue
New York, New York 10017

Wallace L. Duncan
Frederick A. Palmer
Duncan, Brown, Weinberg & Palmer
1700 Pennsylvania Avenue N.W.
Washington, D.C. 20006

Allan M. Garten

Allan M. Garten,
Attorney

Federal Power Commission
Washington, D.C. 20426
202-275-4258
April 7, 1975